UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

SAMUEL GOLD, HOWARD GUY HALBETT, and JOHN FRANK FUSCO, Appellants,	)	
-vs-	)	No. 21176
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' REPLY BRIEF

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I N D E X

LIST OF AUTHORITIES CITED

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APPELLANTS' REPLY BRIEF

The Appellants, in reply to Appellee's Answering Brief, accept the Jurisdictional Statement, Statement of The Case, Specification of Error, and Summary, as set forth in Appellants' Opening Brief and Appellee's Answering Brief. The Appellants will reply to only those issues raised by Appellee's Answering Brief.

A R G U M E N T

I.

THE TRIAL COURT DID ERR IN TAKING JUDICIAL NOTICE THAT UNITED AIR LINES WAS A COMMON CARRIER

The Decision cited by Appellee, Miller and Company of Birmingham v. Louisville & N.R. Co., 328 F.2d 73 (5th Cir. 1964), for the Trial Court's authority to take judicial notice that United Air Lines was a common carrier, is not in

point. This case was a civil case, based on an indemnity agreement, and the Fifth Circuit Court took judicial notice that the railroad in question was a common carrier only because the Alabama Constitution so provided (page 78, footnote 2).

The Appellants' case is a criminal case, founded on a Federal Statute, which Statute requires proof that the Airlines was a common carrier, and occurred in a jurisdiction that does not provide by statute that an airline is a common carrier.

II.

THE TRIAL COURT DID ERR WHEN IT DENIED APPELLANTS' MOTIONS TO SUPPRESS THE OBSCENE FILM AS EVIDENCE.

Subsequent to filing Appellants' Opening Brief, this Circuit decided Corngold v. United States, No. 19.613, United States Court of Appeals for the Ninth Circuit, Sept. 29, 1966.

This Circuit, in Corngold, specifically overruled Marshall v. United States, 352 F.2d 1016 (9th Cir. 1965), which Decision was cited in Appellants' Opening Brief (page 20). The Appellee, in its Answering Brief, attempts to distinguish Corngold from this Appeal (pages 15-16). It is believed that Corngold is not distinguishable and that Corngold further supports the Appellants' position that

the Trial Court erred in denying Appellants' Motions to Suppress. The factual situation in this Appeal as in Corngold are similar.

United Air Lines Customer Service Manager Dunne testified, that but for the intervention of Special Agents Doyle and Murray, he would not have opened the carton, which, when opened, was found to contain obscene film. In Corngold, the TWA employee testified the package was opened because of the government agents request. Agents Doyle and Murray suggested to Dunne that the cartons Gold had delivered were mislabeled [R.T.190]. Customs Agents, in Corngold, also suggested the packages were mislabeled. The record in this Appeal, like the record in Corngold, does not show the packages were opened for any independent purpose by the carrier.

Nextly, Customer Service Manager Dunne, immediately after opening the carton, finding it contained film, notified the F.B.I., who then participated in the search of the cartons. The F.B.I. Agents, like the Customs Agents in Corngold, actively participated in the search of the cartons. The search, like the search in Corngold, was a joint operation.

The obscene film was discovered in the cartons

only after a search of the cartons, independent of the Appellants' consent. The same factual situation existed in Corngold, supra. The initial search of the carton was warrantless, without probable cause, not incident to Appellants arrest and an invasion of Appellants privacy.

The Appellants' case is even stronger than Corngold, for unlike the circumstances in Corngold, no immediate action on the part of the Agents was necessary to prevent the immediate removal of the cartons from the airport. The search by Dunne occurred at 3:50 o'clock P.M. and the shipment would not have left any earlier than 1:00 o'clock A.M. the next morning [R.T.102,109].

Further, unlike Corngold, where Customs Agents using a scintillator detected radioactivity in Corngold's car and established some cause to believe contraband was present in the car and checked into TWA, the Government Agents in the Appeal had observed cartons being placed in Gold's car, but did not follow the car to the airport, and further had no reasonable cause to believe the cartons contained obscene film.

The Appellants' conviction having resulted from an illegal search and seizure of obscene film, the conviction cannot stand. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); Wong Sun v.

United States, 371 U.S.471, 83 S.Ct. 407 9 L.Ed.2d 441 (1963).

CONCLUSION

For the reasons and the authority set forth in Appellants' Opening and Reply Briefs the Appellants' convictions should be set aside.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in fully compliance with those rules.

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